rule is by the Illinois court,[20] where an exception to the principle that no laches can bar the state is said to arise when injury to the public may come from assertion of the right of the state. This must be taken not as conferring unlimited discretionary powers, but as indicating when the question of laches may properly be raised. It evinces, however, a liberal attitude towards that question. The superficial distinction between the "public" and "state" is but a way of indicating the cross-interests[21] of the state which are weighed in this connection. That this is a somewhat different problem from that involved in cases under the statute of 9 Anne, c. 20, appears from comparison of the elements considered respectively in these cases of "laches,"[22] and in those of general discretion to allow suits at private relation.[23] An obvious altering of the balance follows the elimination of the private interests of the relator. The trend seems towards a further inroad upon the prerogative and a widening of the discretionary field,[24] but it will be interesting to see if this newer discretion will itself be gradually crystallized into sub-rules as was, for example, by analogy with the statute of limitations, done with the time element in cases under the Statute of Anne.[25]

WHAT IS ADMISSIBLE EVIDENCE OF VALUE IN EMINENT DOMAIN. — The recent decision of the United States Circuit Court of Appeals for the First Circuit in the *Cape Cod Canal Condemnation Case*[1] contains a far-reaching discussion of several fundamental questions in the law of eminent domain.

It has always been the law that the value of the property to the taker was not the test, and evidence of the value, as distinguished from the utility, of the property in question for any particular purpose is generally held to be inadmissible; but evidence of the utility or availability of the property for any purpose, including the purpose for which the taker may desire it, has almost universally been admitted. The debatable question is whether this special adaptability for use may be shown when the taker is the only person who can put the property to this par-

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[20] People *v.* Union El. R. R. Co., *supra*, at p. 231. And see State *v.* Mansfield, *supra*, at pp. 152–153, which probably states a rule broader than the authorities admit, in saying that the discretion formerly confined to the initiation of *quo warranto* proceedings is now extended to the stage of determination on the merits.

[21] See p. 74, *supra*.

[22] See cases in note 19, *supra*. The facts of Att'y Gen'l *v.* City of Methuen were well within the rule of these cases, several years having elapsed during which the city received various sorts of recognition from the legislature and carried on without objection the functions of government; and, as the case came up on information, plea, and agreed facts, and seems thus to have been treated as before the court upon the merits, and as the decision is grounded upon these cases, it may in course of time find its place in line with them despite the failure to recognize expressly any exception to the rule of *nullum tempus occurrit regi*.

[23] See HIGH, EXTRAORDINARY LEGAL REMEDIES, 3 ed., 558–559.

[24] *Cf.* Att'y Gen'l *v.* N. Y., N. H. & H. Ry., 197 Mass. 194, 83 N. E. 408 (1908); where the existence of another remedy provided by statute is treated as sufficient ground for declining to exercise in favor of the state the jurisdiction in *quo warranto*.

[25] Winchelsea Causes, 4 Burr. 1962 (1766); King *v.* Dickin, 4 T. R. 282, 284 (1791).

[1] United States *v.* Boston, Cape Cod & New York Canal Co., 271 Fed. 877 (1st Circ., 1921). For the facts of this case see RECENT CASES *infra*, p. 86.

ticular use. According to the earlier English cases [2] in which this question was discussed and to the general current of American state court authority, this can be done; but the later English decisions,[3] certain recent state court cases [4] in which the question has been more carefully considered, and the present trend of United States Supreme Court opinions [5] are the other way. The present tendency is to hold that the special utility of the property to the taker alone cannot be stated or described; that is, to reject such evidence, unless there is proof of the existence of a market, outside the desires or necessities of the taker, for the property for the particular use in question. And this is now the decision of the United States Circuit Court of Appeals in a case which presented this issue in its simplest form. It can hardly be doubted that this is a sound decision, and one likely to be followed even by those state courts which have so far overlooked the vital distinction between a special adaptability for a particular use to persons other than the taker, and a special adaptability for the sole use of the party invoking the aid of eminent domain.

The various public service commissions in the country have for the past three years been struggling with the question whether in a rate case in which it is sought to determine the value of the company's property by the test of reproduction cost the greatly enhanced unit prices brought about by the war may be used. These commissions have generally decided that reproduction cost based on such prices does not represent the fair value of the property; but most of them allow the evidence to be received "for what it may be worth" (whatever this may mean), and many of them reach their estimates of reproduction cost by striking an average of unit prices during the few years preceding the date of valuation. The case under review lays down as the true rule that the jury "should not consider the evidence of reconstruction cost upon the question of value, unless they were satisfied that a reasonably prudent man would purchase or undertake the construction of the property at such a figure." This decision, if followed by our Public Service Commissions, will save a great deal of evidence and trouble. No one would think of buying in 1921 a water, gas or electric lighting plant at twice what the property actually cost, or twice what it could have been duplicated for in the years immediately preceding the world war. And to fix the rate-base, so far as it depends on the value of the property, on actual or pre-war costs and prices cannot conceivably amount to a taking of property without "just compensation," if there is no market for the property at the higher figures of the present time.

The actual cost, within a reasonable time, of the property taken is always regarded as evidence, though not conclusive evidence, of present

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[2] The Aspatria Water Board Case, [1904] 1 K. B. 417; Lucas & Chesterfield Gas & Water Board Case, [1909] 1 K. B. 16.

[3] See Sidney *v.* Northeastern Ry. Co., [1914] 3 K. B. 629.

[4] See for instance Matter of Simmons, 130 App. Div. 350, 356, 114 N. Y. Supp. 571, 575 (1909), 195 N. Y. 573, 88 N. E. 1132 (1909); S. C. 229 U. S. 363 (1913); *Re* Public Service Commission, 92 Misc. 420, 155 N. Y. Supp. 985 (1915); Yazoo R. R. *v.* Teissier, 134 La. 958, 64 So. 866 (1914); Tanner *v.* Canal Co., 40 Utah, 105, 121 Pac. 584 (1911).

[5] See New York *v.* Sage, 239 U. S. 57, 61 (1915).

value; and until lately there has not been much dispute as to what was meant by the phrase "actual cost." This was generally held to include the cash sums paid for land and construction, the actual and reasonable cost of supervision and other "overhead" expenditures upon the property, and interest during construction. Recently, however, avaricious claimants have attempted to swell, often to the doubling point, the "actual cost" of the property by including such items of expenditure as incidental costs of financing the company. All these expenditures were held by the Circuit Court of Appeals in the *Canal* case to have been improperly admitted in evidence. The court, however, considered that what are sometimes termed "development costs," meaning the expenses incurred in creating the business and revenue of the enterprise, may be considered as an item or factor in the "going value" of the property, provided the enterprise was a profitable one or there was a reasonable probability that it would become so.

It will be seen that the decision under consideration will, if followed by other courts and by Public Service Commissions, tend very much to simplify the processes of property valuation, which were in great danger of becoming too complicated, and of resulting in figures which are neither sensible nor just.

The unanimous decision of the Circuit Court of Appeals in the *Canal* case was not appealed to the United States Supreme Court. It will, therefore, remain as a far-reaching and authoritative discussion of some of the most important questions in the law of valuation.

N. M.

PROTECTING A MARRIED WOMAN'S INTEREST IN HOMESTEAD PROPERTY. —It is a sensible rule of statutory interpretation, formerly adopted perhaps too reluctantly by the courts,[1] that the general purpose of a statute, and not merely its express terms, should be given effect.[2] Especially is this true when a statute is remedial in nature.[3] The extent to which many courts are willing to apply this rule is found in their attitude toward a common provision of the homestead laws, to the effect that a deed conveying homestead property shall be valid only if signed by both husband and wife.[4] It is clear that with such a statute in force a contract executed only by the husband cannot be specifically enforced against an unwilling wife,[5] since this would defeat the plain meaning of the

[1] For an admirable criticism of the failure of the courts to give full effect to the intent of the legislature, see Dean Pound's article, "Common Law and Legislation," 21 HARV. L. REV. 383.

[2] See DWARRIS, TREATISE ON STATUTES, Potter's ed., 202–212; SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, 2 ed., § 240.

[3] Shea *v.* Peters, 230 Mass. 197, 119 N. E. 746 (1918). See BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS, 2 ed., 487. As to the extent that homestead statutes should be liberally construed as being remedial, see WAPLES, HOMESTEAD AND EXEMPTION, 28.

[4] "No conveyance, mortgage, or other instrument affecting the homestead of any married man shall be of any validity, except for taxes, laborers' and mechanics' liens, and the purchase money, unless his wife joins in the execution of such instrument and acknowledges the same." C. & M. ARK. DIGEST, § 5542. See WAPLES, *op. cit.*, 955.

[5] Mundy *v.* Shellaberger, 161 Fed. 503 (8th Circ., 1908). A similar question arises when a wife refuses to release dower. An early case decreed specific performance in